

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

MATANUSKA ELECTRIC ASSOCIATION, INC.

Employer

and

19-RC-14160

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL UNION 1547, AFL-CIO¹

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6)(7) of the Act, for the following reasons:

The Employer is engaged in providing electrical power generation and distribution in the state of Alaska. The Employer's main offices are located in Palmer, Alaska; the facility where individual sought to be accreted works, the Elkutna Power Plant, is located about 14 miles from Palmer. Petitioner currently is certified as representative of a unit of all power plant employees ("Power Plant Unit," herein). Petitioner seeks a self-determination election to add the single remaining employee employed by the Employer in the Power Plant Unit to Petitioner's unit of outside linemen, meter relay technicians, meter readers, warehousemen, and mechanics ("Outside Unit," herein). The Employer contends that the petition should be dismissed for reasons set forth more fully below.

Petitioner has represented the Outside Unit since about 1961. Petitioner was certified as the bargaining representative of the Power Plant Unit on January 17, 1997 in prior Case 19-RC-13299.

¹ The name of Petitioner appears as corrected at hearing.

² The parties filed briefs, which have been considered.

Thereafter, eight months later, in Cases 19-UC-630 and 19-AC-54, Petitioner sought the accretion of the Power Plant Unit into the Outside Unit. The petitions were dismissed on November 13, 1997. At that time, there were four employees in the Power Plant Unit. Subsequently, the Unit was reduced permanently to a single employee. In 2000, Petitioner filed a petition in Case 19-RC-13992, requesting a self-determination election for the last Power Plant Unit employee to vote on inclusion in the outside unit. The petition was dismissed on August 7, 2000, because the employee was currently represented in a Unit. There is no collective bargaining agreement in effect covering the Power Plant Unit.

The only difference between the instant petition and the petition in prior Case 19-RC-13992 is that on September 18, 2001, the day before the instant petition was filed, Petitioner sent the Employer a letter of disclaimer, which stated in full:

IBEW hereby disclaims interest in representing the Eklutna bargaining unit at MEA. IBEW is disclaiming interest because the Eklutna unit has been reduced to one person and, as such, IBEW has no meaningful bargaining rights with respect to the unit. Because we believe the person remaining in that unit continues to desire union representation, and because IBEW still wants to represent that person, IBEW has filed the attached RC petition with the National Labor Relations Board, in which IBEW is seeking a self-determination election to allow the one person remaining in the Eklutna bargaining unit to vote on whether he wants to be included in the outside bargaining unit at MEA.

The Employer contends that the disclaimer is invalid, and that the petition should be dismissed on the same grounds as the earlier petition in Case 19-RC-13992, inasmuch as there have been no substantial changes in circumstances in the intervening time period. The Decision and Order in the prior case is in relevant part attached hereto as the Appendix. The record supports the Employer's contention that there have been no substantial changes in the Power Plant Unit since the hearing was held in Case 19-RC-13992, and I so find.³

The threshold issue here is whether the disclaimer is valid. As the Board said in *Hartz Mountain Corporation*, 260 NLRB 323, 325 (1982):

A labor organization may, even if it is the incumbent representative of a bargaining unit, choose to disclaim an interest in representing such employees. *Little Rock Machinery Company*, 107 NLRB 715 (1954). At the same time, a "disclaimer to be effective must be unequivocal and must be made in good faith," and an assertion by a union that it has abandoned its claim to representation will be rejected, "if the surrounding circumstances justify an inference to the contrary," or if the union's conduct is "inconsistent" with its alleged disclaimer. *Retail Associates, Inc.*, 120 NLRB 388, 391 (1958).

Here, Petitioner has stated in its disclaimer that it "disclaims interest in representing the Eklutna bargaining unit" and that it "still wants to represent that person" "in the [Outside Unit]." Further, Petitioner sent its disclaimer letter to the Employer one day, and *the next day* filed the instant petition. These actions and statements are asserted by the Employer to be inconsistent. However, if one reads the letter and reviews the circumstances closely, one can see that the Union does disclaim representing the employee in the existing "Unit", but nevertheless still seeks to represent him under alternative circumstances. The disclaimer rules are intended to confront bogus disclaimers for what they are, contrivances to attempt to escape some hallowed principles of the Act or Board procedure. In the instant case, the Union is not attempting to connive an escape from an established collective bargaining situation; rather, it seeks to preserve *collective* bargaining. As things stand, the Union represented the single

³ The only changes that have occurred are that where at the time of the prior hearing, Eklutna employee Rivera went to Palmer once a week to turn in his time sheet and pick up mail, now supervisor Ray Morgan goes to Eklutna once a week for the same purpose; and that Morgan no longer supervises any employees other than Rivera. Further, Rivera has not had any contacts with employees in the outside unit for the past year.

employee, but under circumstances where, contrary to all other Board representation contexts, that representation could not be enforced. The Employer's recognition could be withdrawn at any convenient moment. Under these circumstances, I do not find the disclaimer to violate any principle inherent in the Act, even though it is not absolute and total. Thus, I find the employee to have been deprived of the true representation envisioned by the Act, by non-controllable eventualities, the Employers threat to withdraw recognition, and the reality that a one-person "Unit" is events: the Employer's threat to withdraw recognition, and the reality that a one-person "unit" is essentially meaningless. The sacred policy of industrial stability will not be undermined by honoring the partial disclaimer, because there is no (mutual) stability to protect.

However, in order for an election to be conducted, there must either be an appropriate bargaining unit, or an appropriate residual voting group. Here, the Union seeks a vote only of the single power plant employee. As noted above, that is not an appropriate unit, and is not sought. The Union does not seek to organize any other non-represented employees (to include the Power Plant employees) as a collective bargaining unit.

Under appropriate circumstances, an election can be conducted in a residual voting group, i.e., a "left-over", unrepresented group of employees lacking sufficient separate community of interest to form an appropriate unit, and perhaps lacking any strong affinity to an established unit either. Normally, a residual voting group must include all remaining non-represented employees of the Employer, and if they voted for representation, they would be added into the existing unit. In the instant case, there are approximately 60 other unrepresented employees, varying from dispatchers (who apparently dispatch the Outside Unit and/or perhaps others); customer service employees; billing employees, engineering employees and brush clearers.⁴

An incumbent union seeking to add residuals(s) cannot pick out just one or part of the unrepresented employees. Normally, it's "take all of the residuals, or none".

It might be possible to construct a circumstance where not all of the unrepresented employees would have to be joined as an all-or-nothing, hodge-podge voting group, into some established unit. For example, if some of the non-represented could themselves constitute an appropriate bargaining unit. Or if there were no community of interest between one subset of the non-represented employees (say, office clerical employees) and the receiving unit (say, a P & M Unit), while there were a substantial community of interest between another subset (say, warehouse employees) and the P & M Unit. Presumably, a residual voting groups of warehouse employees, excluding the office clericals, could be appropriate in such circumstance.

The general rule then must be that a residual unit is presumptively all or nothing, unless the petitioner demonstrates the appropriateness of a different voting group. In the instant case, it seems appropriate enough to put the power plant operator in the Outside Unit, if anywhere. But why only him? Why exclude the dispatchers, for example? They appear to have a connection with the Outside Unit - as much as the power plant operator does - and Petitioner has not shown them to be supervisors, and therefore not includable. What about the brush clearers? They work outside, and their work is seemingly integrated with the work of the Outside Unit. (Certainly there is a closer connection of either of these employee groups to the Outside Unit than to the Information Services Unit or the Engineering, Accounting and Operations Unit.

⁴ Here, the situation is somewhat more complex than the "usual" residual circumstance. There are three potential units that could receive a residual voting group. However, all three units are represented by Petitioner, no other labor-organization is involved, and neither party suggests placement of the Power Plant employee in any unit but the Outside Unit.

The bottom line is that the Petitioner has not shown that the Power Plant operator stands out as an appropriate "voting" group. There are multiple others who likely should be included in such a group. Petitioner seeks only the single employee - no others. It has not overcome the presumption that a residual unit is "all or nothing", or that the dispatchers are not statutory supervisors. Nor has Petitioner shown that there is something strikingly unique about the power plant operator, and a profound community of interest between him and the Outside Unit, such that the voting group shall be restricted to this single individual.

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by November 13, 2001.

The U.S. Postal Service has suspended mail delivery at National Labor Relations Board headquarters in Washington DC based on recent events affecting metropolitan postal facilities. It is not clear at this time when mail deliveries will resume.

To address this disruption, the Board, effective immediately, has decided to temporarily permit, without advance permission, the filing of Requests for Review of Regional Director Decision to the Board in Washington, DC by facsimile transmission. The Board's facsimile number is **(202) 273-4270**. The provision of Section 102.114(f) of the Board's Rules and Regulations, noting that the "failure to timely file or serve a document will not be excused on the basis of a claim that transmission could not be accomplished because the receiving machine was offline or busy or unavailable for any other reason," remains effective. Section 102.114(f), (g), and (h) will continue to provide guidance for the filing of all other documents by facsimile transmission.

Furthermore, the Board will continue to apply its "postmark" rule, Section 102.111(b), to filings that are mailed or provided to delivery services. Under the rule, documents that are postmarked or provided to a delivery service the day before the due date or earlier will be accepted regardless of the date the document is received by the Board. However, the Board does not intend to postpone elections because a request for review has not been delivered by the Postal Service. Accordingly, for the time being, use of facsimile or a delivery service is strongly encouraged for the filing of Request for Review.

DATED at Seattle, Washington, this 30th day of October 2001.

Paul Eggert, Regional Director
National Labor Relations Board
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174

470-8840-0100

APPENDIX

Petitioner seeks a self-determination election on whether to add the single remaining employee employed by the Employer in the Power Plant Unit, to Petitioner's unit of outside linemen, meter relay technicians, meter readers, warehousemen, and mechanics ("Outside Unit"). The Employer opposes such election on grounds that the power plant employee is already represented by Petitioner in a certified unit.

In addition to the Power Plant and the Outside Units, Petitioner also represents a unit of about 24 Engineering, Accounting, and Operations employees, and a unit of three Information Services employees. There are also an unspecified number of unrepresented employees, including a receptionist, customer service representatives, clearing crews, and right-of-way employees (who obtain easements). There is no further evidence in the record regarding the unrepresented employees.

Petitioner has represented the Outside Unit since the 1960s. On January 17, 1997, Petitioner was certified as the bargaining representative of a unit of all employees employed by the Employer at the power plant, in Case 19-RC-13299. At that time, there were four employees in the Power Plant Unit. In April or May 1999, one such employee left her employment to take another job, and two other power plant employees were permanently laid off. The layoffs occurred because renovations to the power plant, including the installation of modern automation equipment, made their jobs unnecessary. The record is clear that the vacancy left by the aforementioned resignation is permanent. One Power Plant Unit employee, John Rivera, the relief operator electrician, was retained in order to have someone on-site to assure that the plant was running properly.

On May 30, 2000, the Employer sent a letter to Petitioner, inviting Petitioner to disclaim interest in representing the Power Plant Unit, inasmuch as it is now a one-person unit. The letter also advised Petitioner of the Employer's intention, in the absence of a disclaimer, to withdraw recognition. As of the date of the instant hearing on July 17, 2000, Petitioner had not disclaimed, nor had the Employer withdrawn recognition. There is no contract in effect covering either the Power Plant or Outside Units; both groups are working under implemented offers. The most recent negotiations for the Power Plant Unit took place on April 19, 1999.

The Employer shares ownership of the power plant with Anchorage Municipal Light and Power (ML and P, herein), and Chugach Electric. There are personnel employed by ML and P who work in the power plant, but Rivera is the only employee of the Employer who works there.

Rivera is directly supervised by Ray Morgan, who has an office in Palmer. Rivera visits the Palmer office once a week on Thursdays to turn in his weekly time sheet and pick up his paycheck. In the past, he also attended a safety meeting there every Thursday. However, the holding of such meetings has been suspended since early summer, because the other employees who regularly attended are busy during the construction season, and because Morgan temporarily has additional duties. Morgan also supervises the meter relay technicians who are included in the Outside Unit.

At the power plant, Rivera spends about 60 percent of his day sitting at a board monitoring remote gauge readings, and the remaining 40 percent walking around the plant verifying the remote readings with the actual gauges on the machinery. Rivera is the only employee of the Employer certified to perform "lock out, tag out" duties inside the power plant. Lockout, tag-out is the process of de-energizing a line so that it is safe for an outside crew to work on. The procedure followed by Rivera is a procedure established by ML and P. It requires Rivera to open the relevant switch to de-energize the line, then to complete appropriate paperwork showing that the line is de-energized and safe to work on. All members of the outside crew that will be working on the line are required to sign the paperwork before working on the de-energized line. The arrangements for a lockout, tag-out are formally made through ML and P dispatchers. Rivera and two Employers outside linemen testified that they have some contact with

each other during the process. There have been two occasions so far in 2000 when Rivera was required to do a lockout, tag-out for an Outside crew to perform work in the vicinity of the power plant. Rivera had brief face-to-face contacts with members of those crews during those times.

Rivera otherwise has brief contacts with Outside Unit mechanics when he drops off his Employer-provided pickup truck at the mechanic shop for servicing, and when a warehouse employee, every few months, delivers supplies to the power plant.

The outside linemen report directly to Tom Kelly in Eagle River, Don Tanner in Big Lake, and Steve Willis in Palmer. Kelly, Tanner, and Willis report to Robert Drake. Rivera's supervisor, Morgan, also reports to Drake, as do the supervisors of the warehouse employees and the mechanics. Outside linemen work on the Employer's transmission and distribution system throughout the area of service coverage. Their duties include repairing, maintaining, and constructing the lines. Meter relay technicians work in substations throughout the service area, and in their shop in Palmer. Warehouse employees and mechanics work in Palmer. Meter readers are based in Palmer and travel throughout the system.

Rivera is paid \$31.23 per hour, and works Monday through Friday, 7:00 a.m. to 3:30 p.m. Outside linemen are paid \$30.514 per hour, and Outside Unit employees work 8:00 a.m. to 4:30 p.m. Meter readers are paid \$15.00 to \$16.00 per hour. The wages of other classifications in the Outside Unit are not specified in the record. Rivera is covered by a different pension plan than are the Outside Unit employees. Outside Unit employees receive an annual clothing allowance of \$150.00 and an annual tool allowance of \$75.00; Rivera receives neither. Outside linemen, mechanics, and warehouse employees are required to have commercial driver's licenses; Rivera is not. Rivera never performs any of the work of any Outside Unit employees, nor do any Outside Unit employees ever perform Rivera's work.

The Board permits employees to vote on their unit preference only when simultaneously, voting on a bargaining representative, such as a part of a residual voting group, or a "professional" election. In the absence of a question concerning representation ("QCR"), a self-determination election is not the appropriate means for establishing a unit determination. *Southern California Water Co.*, 241 NLRB 771 (1979), *Libbey-Owens-Ford Company* 189 NLRB 869 (1971). There is no statutory procedure for represented employees to change the scope of their own unit, or that of another unit, simply by voting themselves into another unit.

As yet, Petitioner has not disclaimed interest in representing the employees of the power plant in the Power Plant Unit, nor has the Employer withdrawn recognition with respect to the Power Plant Unit. Petitioner has asserted in the record and on brief that if the instant petition is dismissed, it *will* disclaim interest, and then refile a petition seeking a self-determination election for the lone power plant employee. Such assertion is merely speculative at this time. No party has requested that the certification in Case 19-RC-13299 be revoked on grounds that the Power Plant Unit is now an inappropriate, one person unit.

Inasmuch as the Employer currently recognizes Petitioner as the collective bargaining representative of the Power Plant Unit, and Petitioner has not disclaimed interest in representing that Unit as a separate unit, there is at this time no QCR with respect to the power plant employee.

332-2580-7800